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(2)

No. 06-1632

IN THE

Supreme Court of the United States

JTEKT CORPORATION (F/K/A/ KOYO SEIKO COMPANY, LTD.), KOYO CORPORATION OF U.S.A, NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC., AND NTN-BOWER CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR TIMKEN US CORPORATION IN OPPOSITION

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QUESTION PRESENTED

If an agency's determination was the subject of an adverse decision by the World Trade Organization's Dispute Settlement Body, should the U.S. court which affirmed the agency's determination nevertheless issue a remand order, when (1) the statute governing implementation of WTO decisions expressly precludes the relief sought by the desired remand; (2) the agency's determination conformed with long-established U.S. law and agency practice; and (3) the agency's practice remained unchanged.

PARTIES TO THE PROCEEDING

Timken US Corporation is a party to the proceeding, but is not listed in the caption. Timken US Corporation was formerly known as the Torrington Company.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Timken US Corporation is a wholly-owned subsidiary of The Timken Company.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 4

A. U.S. implementation of adverse WTO dispute settlement decisions 4

B. The contested agency determination 6

C. WTO dispute settlement decisions, generally 8

D. The particular WTO decisions invoked by the petitioners, and their aftermath 12

E. Commerce's calculation of weighted average dumping margins, in its statutory context 14

F. Petitioners' allegation that Commerce changed its practice 16

G. Prior judicial review of Commerce's method 17

REASONS FOR DENYING THE PETITION 19

I. The result sought by the petitioners is expressly precluded by the statute 19

II. The DC Circuit precedent identified by the petitioners does not apply, because there has been no change at all in the applicable agency policy or regulation..... 22

III. The Court of Appeals for the Federal Circuit respected the separation of powers..... 24

A. Petitioners' arguments rest on assumptions that are either wrong, or not yet knowable....25

B. The Court correctly decided not to interject itself in a process which the statute has assigned to Congress and the Executive Branch.....27

CONCLUSION 30

APPENDIX -- STATUTORY PROVISIONS.....1A

19 U.S.C. § 1673. Imposition of antidumping duties.....1A

19 U.S.C. § 1675. Administrative review of determinations.....3A

19 U.S.C. § 1677. Definitions; special rules.....7A

19 U.S.C. § 3512. Relationship of agreements to United States law and State law 9A

19 U.S.C. § 3533. Dispute settlement panels and procedures.....11A

TABLE OF AUTHORITIES

Cases

Bowe Passat Reinigungs- Und Waschereitechnik GmbH v. United States, 926 F. Supp. 1138 (Ct. Int'l Trade 1996) 17

Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974) 27

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Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006) 17, 29

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Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 12

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United States v. Pink, 315 U.S. 203 (1942) 29

Statutes

19 U.S.C. § 1202 3

19 U.S.C. § 1671 ..... 2, 4, 5

19 U.S.C. § 1673b(d) 6

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19 U.S.C. § 1673e(a) 6

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19 U.S.C. § 1677 4

19 U.S.C. § 1677(34) 14

19 U.S.C. § 1677(35) 14, 15, 29

19 U.S.C. § 3533 ..... 2, 28

19 U.S.C. § 3538 ..... 2, 4, 5, 19, 21

Regulations

19 C.F.R. § 351.212 ..... 6, 7

19 C.F.R. § 353.2(f) (1993) 15

Antidumping Duties, Final Rule, 54 Fed. Reg. 12742, 12770 (Dep't Comm. Mar. 28, 1989) 15

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Revocations and Partial Revocations of Certain Antidumping Duty Orders, 72 Fed. Reg. 25261 (Dep't Comm. May 4, 2007) 22

Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 36067 (Dep't Comm. May 22, 2002) 27

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the Settlement of Disputes, *reprinted in* H.R. Doc. No. 103-316, Vol. 1., 1008 ..... passim

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World Trade Organization, *Proposal from the United States, Proposal On Offsets For Non-Dumped Comparisons,* TN/RL/GEN/147 (June 27, 2007) 14

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BRIEF OF TIMKEN US CORPORATION IN OPPOSITION

OPINIONS BELOW

Timken US Corporation is satisfied with the presentation contained in the petition.

JURISDICTION

Timken US Corporation is satisfied with the presentation contained in the petition.

STATUTES AND REGULATIONS INVOLVED

Petitioners omit the statutory provisions that dispose of their arguments. The Uruguay Round Agreements Act ("URAA"), Pub. L. 103-465, Dec. 8, 1994, 108 Stat. 4809, at Sections 123 and 129, codified as 19 U.S.C. §§ 3533 and 3538, prescribe in detail the procedures to be followed after an adverse WTO panel report or WTO Appellate Body decision. Opp. App. 11a-16a. Section 129 of the URAA, 19 U.S.C. § 3538 disposes of petitioners' claims, and is set forth here, in relevant part:

19 U.S.C. § 3538. Administrative action following WTO panel reports

* * *

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. § 1202 *et seq.*], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] that are implemented under this section *shall apply with respect to unliquidated entries of the subject merchandise* (as defined in section 771 of that Act [19 U.S.C. § 1677]) *that are entered, or withdrawn from warehouse, for consumption on or after-*

> **(A)** in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and
>
> **(B)** *in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.*
>
> * * *

(Pub. L. 103-465, Title I, Sec. 129, Dec. 8, 1994, 108 Stat. 4836.) (emphasis added)

STATEMENT OF THE CASE

A. U.S. implementation of adverse WTO dispute settlement decisions

U.S. implementation of adverse WTO decisions is governed by statute. Section 129(b) of the URAA, 19 U.S.C. § 3538(b) (*supra*, Statute and Regulations in-

volved) prescribes procedures if a WTO dispute panel or Appellate Body report "contains findings that an action by [Commerce] in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. § 1671 *et seq.*] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Duty Measures... ."

Section 129(b) applies here, as the petitioners contest an action by Commerce in a specific annual review (in this case: Commerce's calculation of the weighted-average dumping margin in the 11th annual review, for subject bearings imported from May 1, 1999 to April 30, 2000). Section 129(c)(1)(B), 19 U.S.C. § 3538(c)(1)(B), prescribes the effect of implementation determinations, if made, on Commerce determinations like the one in issue here: they apply to entries of merchandise imported on or after the date on which the United States Trade Representative directs Commerce to implement the adverse WTO decision.

All the imports in issue here were imported prior even to the adverse WTO decision in question (adopted on January 9, 2007), and, necessarily, prior to any decision to implement the adverse decision, since such a decision has not yet been made. Hence, the entries of concern to the petitioners cannot be affected by any decision to implement the adverse WTO decision, even if such a decision should be made.

B. The contested agency determination

In 1989, Commerce and the United States International Trade Commission determined that antifriction bearings imported from, *inter alia*, Japan were sold at less than fair value in the United States, and that such imports injured the domestic industry producing like products. These determinations resulted in the imposition of antidumping duty duties. *Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof from Japan,* 54 Fed. Reg. 20904 (Dep't Comm. May 15, 1989); 19 U.S.C. §§ 1673, 1673b(d), 1673d(c), 1673e(a).

The amount of antidumping duty to be assessed is subject to annual antidumping administrative reviews. The purpose of such a review is to calculate the dumping margin for "each entry" within the period of review, and to assess duties on the basis of these determinations. 19 U.S.C. § 1675(a)(1)(B) and (2)(A) and (C). *See also* 19 C.F.R. § 351.212(b)(1). Absent review, entries are assessed at the deposit rates. 19 C.F.R. § 351.212(c).[1]

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[1] As explained in the legislative history of the 1979 amendments:

> "In the case of a review of an antidumping duty order, the results of the review will include a determination of the foreign market value and the United States price of each entry of merchandise subject to that order and included

At issue here is Commerce's calculation of dumping margins in the 11th annual review of the antidumping duty order on antifriction bearings from Japan. This review covered subject bearings imported from May 1, 1999 to April 30, 2000. The final results of this review were published as *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 Fed. Reg. 36551 (Dep't Comm. July 12, 2001).

Commerce's final results were affirmed by the U.S. Court of International Trade on August 10, 2004. Koyo and NTN[2] appealed to Court of Appeals

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> within the review, and the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry. That determination will be the basis for the assessment of antidumping duties on entries of the merchandise included within the review and for deposits of estimated duty on entries not covered by the review."

Trade Agreements Act of 1979, 96th Cong., 1st Sess., H.R. Rep. No. 96-317, at 71-72 (describing the operation of the annual review procedure, introduced at that time). *See also* 19 C.F.R. § 351.212(a)-(c).

[2] The petitioners are exporters of bearings. In briefing to the agency during the review, the petitioners contested various aspects of Commerce's methodology, including, in particular, the treatment of sales that were *not* dumped in the calculation of weighted average dump-

of the Federal Circuit, which affirmed the CIT on December 8, 2006. Pet. at 2a. In addition, the Court of Appeals rejected NTN and Koyo's joint petition for panel rehearing or to stay or extend the time to issue a mandate pending decisions by the United States regarding the implementation of an adverse decision by the WTO Dispute Settlement Body.

C. WTO dispute settlement decisions, generally

In 1994, the United States became a party to the Uruguay Round Agreements. These include the WTO Agreement,[3] the Antidumping Agreement[4] and the Dispute Settlement Understanding (DSU).[5] These agreements, which are not self-executing, were implemented in U.S. law by the URAA. *See, e.g., Uruguay Round Agreements Act, Statement of Administrative Action*, at 11-12, 103d Cong., 2d

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ing margins. Subsequently, Koyo and NTN both filed a summons and complaint contesting the agency's final results. Koyo's complaint contested the treatment of sales that were not dumped; NTN's did not.

[3] Agreement Establishing the World Trade Organization, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1327-37 (1994) (including list of annexed materials).

[4] Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (a/k/a the Antidumping Agreement), *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1453-77 (1994).

[5] Understanding on Rules and Procedures Governing the Settlement of Disputes, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1654-78 (1994).

Sess., H.R. Doc. No. 103-316, Vol. 1, 656, at 667-68 (1994), *reprinted in* 1994 U.S.C.C.A.N. Vol. 6, 4040 (hereinafter "*SAA*").[6]

In the DSU, the parties established a Dispute Settlement Body authorized to adopt panel or Appellate Body reports addressing disputes arising under the agreements. The panel or Appellate Body reports contain conclusions addressing whether the identified measures conform with agreements covered by the DSU, but otherwise contain *recommendations only*:

> 1. Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall *recommend* that Member concerned bring the measure into conformity with that agreement. In addition to its *recommendations*, the panel or Appellate Body may *suggest ways* in which the Member concerned *could* implement the recommendations.

DSU, Art. 19, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1666 (1994) (emphasis added; footnotes omitted). Thus, as explained at length in the *SAA*:

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[6] For ease of reference, page citations to the SAA will reflect the pagination of H.R. Doc. No. 103-316, which is also reproduced in 1994 U.S.C.C.A.N. Vol. 6, 4040.

> It is important to note that the new WTO dispute settlement system does not give the panels any power to order the United States or other countries to change their laws. If a panel finds that a country has not lived up to its commitments, all a panel may do is recommend that the country begin observing its obligations. It is then up to the disputing countries to decide how they will settle their differences.

SAA at 1008. And again:

> When it finds that a government's measure is inconsistent with a Uruguay Round Agreement, a panel or the Appellate Body must issue a recommendation to that government to bring the offending measure into conformity with the agreement. While the panel or Appellate Body may also suggest ways to implement such a recommendation, Article 19 makes it clear that any such suggestion is non-binding. Any decision on whether or how to implement such a recommendation is entirely a matter for the country concerned.

SAA at 1015.

Thus, after an adverse finding, an affected country may choose among various actions, including doing nothing:

> The defending country may choose to make a change in its law. Or it may decide instead to offer trade "compensation" – such as lower tariffs. The countries concerned could agree on compensation or on some other mutually satisfactory solution. Alternatively, the defending country may decide to do nothing. In that case, the country that lodged the complaint may retaliate by suspending trade concessions equivalent to the trade benefits it has lost.

SAA at 1009. *See also* DSU, Arts. 3.7 and 22.1-2, *reprinted in* H.R. Doc. No. 103-316, Vol. 1 at 1655-56 and 1668. In addition, the dispute settlement decisions cannot modify the parties' rights or obligations under the agreements, and parties always retain the right to seek an authoritative interpretation of any Agreement from the Ministerial Conference or General Council of the WTO. *SAA* at 1010; DSU Arts. 3.2, 3.9 and 19.2, *reprinted* in H.R. Doc. No. 103-316, Vol. 1 at 1655-56 and 1667.

Finally, dispute settlement decisions, even if final, "are not binding, except with respect to resolving the particular dispute between the parties to that dispute." WTO, *Japan - Taxes on Alcoholic Beverages, AB-1996-2*, WT/DS8/AB/R (Oct. 4, 1996), Section E (status of adopted panel reports); WTO, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/R (Aug. 24, 1998), par. 7.30; WTO, *United States - Tax*

Treatment for "Foreign Sales Corporations," AB-1999-9, WT/DS108/AB/R (Feb. 24, 2000), par. 108.[7]

D. The particular WTO decisions invoked by the petitioners, and their aftermath

Following a complaint by the Government of Japan, a WTO dispute panel reported that Commerce's calculation of the weighted-average dumping margin (including "zeroing"), as done in administrative reviews (including the review in issue in this case), was *consistent* with the Antidumping Agreement. WTO, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/R (Sept. 20, 2006), at Paras. 7.227 and 7.259(b)-(c). This initial finding, however, was reversed by a subsequent decision of

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[7] As such, the interpretations found in the panels' various decisions are *not* rules of general application nor are they widely accepted. Hence, they do not constitute "the law of nations as understood in this country." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). *See Restatement of the Law, Third, The Foreign Relations Law of the United States*, Vol. I, §101 (defining international law, as used in the restatement, as "rules and principles of general application") and §102(3) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."); *Sampson v. Federal Republic of Germany*, 250 F.3d 1145, 1154 (7th Cir. 2001) (not applying *Charming Betsy* where international law consisted of evolving customary law).

the Appellate Body, which was ultimately adopted by the DSB. WTO, *Appellate Body Report, United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007), at Para. 190(e) (findings and conclusions).

Petitioners claim, at least in their argument, that "the United States also committed to the WTO *in this specific administrative review* that it will implement the WTO's rejection of zeroing." Pet. at 17.[8] This is incorrect. The United States indicated that "it intends to comply in this dispute with its WTO obligations and will be considering carefully how to do so." "U.S. Statements at the WTO Dispute Settlement Body Meeting," delivered by David P. Shark, Deputy Chief of U.S. Mission to the WTO at Geneva, at Item 2.A. (Feb. 20, 2007), available at: www.us-mission.ch/Press2007/0220DSB. *Accord* Pet. at 10 (statement of the case).

Petitioners also assert that "[t]he United States has committed to Japan that it will fully implement the Appellate Body's decision by December 24, 2007." Pet. at 10. This too is incorrect. Instead, the United States and Japan "mutually agreed that the reasonable period of time for the United States to implement the recommendations and rulings of the Dispute Settlement Body (DSB) in the dispute 'United States – Measures Relating to Zeroing and Sunset Reviews' (WT/DS322) shall be 11 months, expiring

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[8] *But see* Pet. at 10.

on 24 December 2007." WTO, *United States – Measures Relating to Zeroing and Sunset Reviews*, Agreement under Article 21.3(b) of the DSU, WT/DS322/20 (May 8, 2007).

Finally, the petitioners omit that the United States has expressed its opposition to the Appellate Body report in a communication by the United States to the Members of the WTO and the Dispute Settlement Body, and has made proposals to the WTO to add language to the Antidumping Agreement affirming that the member countries' antidumping authorities do *not* have an obligation under the Agreement to offset the results of comparisons where the export prices exceeded normal value (fair sales) against comparisons where the export prices were less than the normal value (dumped sales). WTO, *Communication from the United States, United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/16 (Feb. 26, 2007); WTO, *Proposal from the United States, Proposal On Offsets For Non-Dumped Comparisons,* TN/RL/GEN/147 (June 27, 2007).

E. Commerce's calculation of weighted average dumping margins, in its statutory context

"The terms 'dumped' and 'dumping' refer to the sale of goods at less than fair value." 19 U.S.C. § 1677(34). The "dumping margin" is the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). The "weighted average dumping margin" is the percentage obtained by dividing the "aggregate dumping margins" by "the ag-

gregate export prices and constructed export prices ... ." 19 U.S.C. § 1677(35)(B).[9]

To obtain the *denominator* in the weighted-average dumping margin calculation (the aggregate prices), Commerce aggregates all prices, as observed in all transactions, whether or not dumped. Commerce's calculation of the denominator of the weighted average dumping margin is not contested.

To obtain the *numerator* of the weighted-average dumping margin calculation (the aggregate dumping margins), Commerce totals the dumping margins, *i.e.*, the amounts "by which the normal value exceeds the export price or constructed export price," in the sales where this is the case (*i.e.*, the dumped sales). The non-dumped sales do not have any amount of dumping. The dumping margin is thus "zero," and no amount is added to or subtracted from the aggre-

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[9] The definitions of "dumping margin" and "weighted average dumping margin," added to the statute in 1994, were substantially identical to definitions in Commerce's pre-existing regulations. *See* Uruguay Round Agreements Act, 103d Cong. 2d Sess., S. Rep. No. 103-412 at 79-80 (1994); 19 C.F.R. § 353.2(f)(1) (1993) ("*Dumping margin*" means the amount by which the foreign market value exceeds the United States price of the merchandise") and (f)(2) ("The '*weighted-average dumping margin*' is the result of dividing the aggregated dumping margins by the aggregated United States prices.") (italics in original); *Antidumping Duties, Final Rule*, 54 Fed. Reg. 12742, 12770 (Dep't Comm. Mar. 28, 1989).

gate amounts of dumping found. The latter calculative measure has come to be known (among its opponents in particular) as "zeroing."

The incidence of fair sales reduces the weighted-average dumping margin, because *all* sales, including sales sold at fair value, are included in the denominator of the calculation. Commerce's methodology, however, does not permit the amounts by which some sales are *not* dumped to offset the actual dumping margins found in dumped sales.

F. Petitioners' allegation that Commerce changed its practice

Petitioners assert that Commerce's zeroing practice is "a policy that Commerce has since announced it will abandon." Pet. at 3. Elsewhere Petitioners cite *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dep't Comm. Dec. 27, 2006), as evidencing a "change in policy." Pet. at 8-9. *See also id.* at 16 (asserting the "Executive Branch" has announced its intention to modify the zeroing practice).

Petitioners' characterizations erroneously imply that Commerce has abandoned the zeroing practice as applied in antidumping annual reviews, such as the agency determination in issue here. Commerce has *not* done so. As discussed in more detail in the argument section of this opposition, while Commerce adopted a change in investigations, it expressly de-

clined invitations to apply the change to other types of determinations, such as annual reviews.

G. Prior judicial review of Commerce's method

Commerce's method has twice been approved as lawful under U.S. law by the Court of Appeals for the Federal Circuit, regardless of adverse WTO decisions. *Timken Co. v. United States,* 354 F.3d 1334, 1342-45 (Fed. Cir. 2004), *cert. denied sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004); *Corus Staal BV v. Dep't of Commerce,* 395 F.3d 1343, 1346 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006).

It has also been upheld numerous times by the Court of International Trade. *Serampore Indus. Pvt. Ltd. v. U.S. Dep't of Commerce*, 675 F. Supp. 1354, 1360-61 (Ct. Int'l Trade 1987); *Bowe Passat Reinigungs- Und Waschereitechnik GmbH v. United States*, 926 F. Supp. 1138, 1150 (Ct. Int'l Trade 1996). And, more recently, applying the law as modified in 1994, *Timken Co. v. United States*, 240 F. Supp.2d 1228, 1242-44 (Ct. Int'l Trade 2002), *aff'd*, 354 F.3d 1334, 1342-45 (Fed. Cir. 2004), *cert. denied sub nom. Koyo Seiko Co., Ltd. v. United States*, 543 U.S. 976 (2004); *Corus Staal BV v. U.S. Dep't of Commerce*, 259 F. Supp.2d 1253, 1264-65 (Ct. Int'l Trade 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005), *cert. denied*, 546 U.S. 1089 (2006); *PAM, S.p.A. v. U.S. Dep't of Commerce*, 265 F. Supp.2d 1362, 1373 (Ct. Int'l Trade 2003); *Corus Engineering Steels Ltd. v. United States*, 27 CIT 1286, 2003 WL 22020504, Slip Op. 03-110 at 18 (Ct. Int'l Trade) (Aug. 27, 2003); *Slater Steels Corp. v. United States*,

297 F. Supp.2d 1351, 1359 (Ct. Int'l Trade 2003), *aff'd on other grounds*, 159 Fed. Appx. 1007 (Fed. Cir. Dec. 6, 2005); *NSK Ltd. v. United States*, 346 F. Supp.2d 1312, 1321 (Ct. Int'l Trade 2004), *aff'd on other grounds*, 481 F.3d 1355 (Fed. Cir. 2007), *petition reh'g denied* (May 3, 2007), Order of the U.S. Supreme Court Temp. Ct. No. 07A84 (Aug. 23, 2007) (granting extension of time to file petition for cert. until Sept. 30, 2007); *Corus Staal BV v. United States*, 387 F. Supp.2d 1291, 1300 (Ct. Int'l Trade 2005), *aff'd*, 186 Fed. Appx. 997 (Fed. Cir. 2006), *rehearing en banc denied* (CAFC No. 05-1600, Sept. 12, 2006), *cert. denied*, 127 S. Ct. 3001 (No. 06-1057, June 25, 2007);[10] *NSK Ltd. v. United States*, 416 F. Supp.2d 1334, 1338-39 (Ct. Int'l Trade 2006); *Paul Müller Industrie GmbH & Co. v. United States*, 435 F. Supp.2d 1241, 1245 (Ct. Int'l Trade 2006), *reconsideration on other grounds denied by*, 442 F. Supp.2d 1363 (Ct. Int'l Trade 2006); *Koyo Seiko Co. Ltd. v. United States*, 442 F. Supp.2d 1360, 1363 (Ct. Int'l Trade 2006) (motion to amend complaint denied – noting Federal Circuit precedent re zeroing); *Dorbest Ltd. v. United States*, 462 F. Supp.2d. 1262, 1316-17 (Ct. Int'l Trade 2006); *Corus Staal BV v. United States*, 2006 WL 2056401, Slip Op. 06-112 at 6 (Ct. Int'l Trade July 25, 2006); *SKF USA Inc. v. United States*, 491 F. Supp.2d 1354, 1365-66 (Ct. Int'l Trade 2007).

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[10] Petitioners offered similar arguments (*i.e.*, circuit conflict with respect to an alleged change in agency policy, international obligations).

In addition, the courts have repeatedly rejected attempts to stay litigation regarding Commerce's method pending developments regarding adverse WTO decisions. *E.g.*, in litigation regarding the bearings antidumping orders: Order of the U.S. Court of Appeals for the Federal Circuit, *SNR Roulements v. United States*, Appeal Nos. 05-1297, -1323, at 3 (May 30, 2006) (re the instant case – Order simultaneously entered in Appeal No. 05-1296 and captioned as "*NSK Ltd. v. United States*") ("As we have indicated in an earlier order, we are not persuaded that stays pending resolution of the WTO proceedings is warranted."); Order of the U.S. Court of Appeals for the Federal Circuit, *SNR Roulements v. United States*, Appeal Nos. 05-1297, -1322, -1323, at 3 (June 30, 2005) (re the instant case) ("Koyo's motion for a stay pending completion of WTO proceedings is denied.").

REASONS FOR DENYING THE PETITION

I. The result sought by the petitioners is expressly precluded by the statute

The petitioners principally argue that, without a remand, Commerce will not be able to apply the WTO decision and recalculate the duties on the entries that are the subject of their appeal, *i.e.* entries imported in the May 1, 1999 to April 30, 2000 period. Pet. at 14-15.

The URAA, however, in Section 129, 19 U.S.C. § 3538, contains express instruction regarding the implementation of a WTO decision that an agency action in a particular proceeding does not conform with

WTO agreements. The statute prescribes that such an implementation determination "*shall apply* with respect to unliquidated entries of subject merchandise ... that are entered, or withdrawn from warehouse, for consumption on or *after ... the date on which the United States Trade Representative directs the administering authority ... to implement that determination.*" 19 U.S.C. § 3538(c)(1)) (emphasis added).[11]

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[11] As also explained in the Statement of Administrative Action:

> Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) [19 U.S.C. § 3538(c)(1)] provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only. That is, they apply to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on or after the date on which the Trade Representative directs implementation. Thus, relief available under subsection 129(c)(1) is distinguishable from relief available in an action brought before a court or a NAFTA binational panel, where, depending on the circumstances of the case, retroactive relief may be available. Under 129(c)(1), if implementation of a WTO report should result in the revocation of an antidumping or countervailing duty order, entries made prior to the date of [sic] Trade

The entries at issue here concern merchandise imported between May 1, 1999 and April 30, 2000. Thus, the entries that were the subject of the annual review are statutorily out of the reach of any implementation determination, and the result sought by the petitioners is precluded by the statute.

Consistent with the statute's mandate, Commerce's Section 129 decisions to date have never made changes to entries which pre-dated the direction from the USTR to Commerce to implement a decision of the WTO Dispute Settlement Body. The petitioners cite no such decisions, because there are none. For example, in its recent Section 129 decisions implementing the WTO decision regarding zeroing in *original investigations*, Commerce revoked certain antidumping orders. The revocation, however, did not apply to entries which predated the date of implementation directed by the United States Trade Representative. *Implementation of the Findings of the WTO Panel in US--Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders,* 72 Fed. Reg. 25261 (Dep't Comm. May 4,

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Representative's direction would remain subject to potential duty liability.

SAA at 1026 ("Effect of Determination"). Similar explanations and instructions are found in the House and Senate reports. 103d Cong., 2d Sess., H.R. Doc. No. 103-826(1) at 39 (1994), *reprinted in* 1994 U.S.C.C.A.N., Vol. 6, 3773, 3811; S. Rep. No. 103-412 at 27 (1994).

2007), Issues and Decision Memorandum of Apr. 9, 2007, at 17,[12] available at: www/ia/ita.doc.gov/download/zeroing/zeroing-sec-129-final-decision-mem.200700410.

II. The DC Circuit precedent identified by the petitioners does not apply, because there has been no change at all in the applicable agency policy or regulation

Petitioners assert that the Federal Circuit's decision to affirm Commerce's determination is at odds with D.C. Circuit precedent requiring that a court reviewing an agency decision must remand to the agency "when the agency has announced a change in its governing regulations or policies during the pendency of the appeal." Pet. at 12, citing, *Panhandle Eastern Pipe Line Co. v. FERC*, 890 F.2d 435, 438-39 (D.C. Cir. 1989). Thus, they argue, the Federal Circuit's decision in the instant matter "perpetuates an unwarranted conflict" between the cir-

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[12] *Accord Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan*, 67 Fed. Reg. 71936, 71937 (Dep't Comm. Dec. 3, 2002), applying newly calculated rates to "unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after November 22, 2002," which was the date USTR directed Commerce to implement the Section 129 determination.

cuits in the law governing judicial review of federal agencies. Pet. at 12-16.

Petitioners' argument is premised on the existence of a change in agency policy, practice or regulation. Here, there has been no change. Commerce has *not* abandoned, or announced that it would abandon, any part of the methodology employed to calculate weighted-average dumping margins in annual reviews. Commerce has announced a change with respect to the calculation of estimated weighted-average dumping margins in original *investigations*—but this change does *not* apply to annual reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Investigation; Final Modification*, 71 Fed. Reg. 77722 (Dep't Comm. Dec. 27, 2006).[13] Indeed, Commerce, when announcing the change in practice with regard to investigations, expressly rejected the suggestion of some commenters that the change adopted by Commerce for purposes of *investigations* should also be applied in *other segments* of antidumping proceedings (such as reviews):

> In its March 6, 2006 **Federal Register** notice, the Department proposed only

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[13] In addition, it is the position of Timken that the antidumping statute mandates the "zeroing" methodology. Supra, page 14, discussing the methodology in its statutory context. Thus, Commerce does not have the authority to change its practice, whether in investigations or annual reviews.

> that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. The Department made no proposals with respect to any other comparison methodology or any other segment of an antidumping proceeding, and thus declines to adopt any such modifications concerning those other methodologies in this proceeding.

71 Fed. Reg. 77722, 77724 (emphasis in original). *See also, infra*, reviewing the ways in which Commerce may abide by its international obligations.

Petitioners' argument further fails because it does not account for the fact that here there is specific statutory instruction. Assuming, *arguendo*, that there was a change, here there is no need "to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act," Pet. at 14, citing *NLRB v. Food Store Employees Union*, 417 U.S. 1, 10 n.10 (1974), because here there is express statutory instruction regarding the temporal reach of any change. As discussed before, the statute precludes application of a change to entries imported prior to the date USTR directs implementation.

III. The Court of Appeals for the Federal Circuit respected the separation of powers

Petitioners assert that the United States has communicated "that it intends to comply in this dis-

pute with its WTO obligations and will be considering carefully how to do so." Pet. at 17-18. According to the petitioners, however, unless a remand is issued to the agency, there "will be *no* way to comply with its treaty obligations in this administrative review...". *Id.* at 18. Thus, they argue, the Federal Circuit Court's refusal to remand interfered with the Executive Branch's ability to comply with the United States' WTO obligations. *Id.* at 16-20. The same allegations appear in the Petitioners' statement of the case. *Id.* at. 10.

A. Petitioners' arguments rest on assumptions that are either wrong, or not yet knowable

The petitioners assume, at the least: (1) that United States may abide by its WTO obligations *only* by abandoning its long-standing zeroing practice as applied in reviews; (2) that the United States, *if* it determined to abandon its long-standing practice, *must* retroactively apply that change to the current review; and (3) that if the United States determined to retroactively apply the particular change adopted, the application of such a change would require that dumping duties be modified (presumably, lowered or eliminated).

The second assumption has already been discussed. Recalculating the duties on the subject entries would be contrary to the statute, which directs that any change may be applied only to entries after the date USTR directs implementation. *Supra*, Section I.

The first assumption too, however, is plainly erroneous. As reflected in the DSU itself, in the U.S. statute implementing the WTO Agreements, and in the *SAA* accompanying the statute, the U.S. executive branch, in consultation with the Congress, may choose any number of different responses to an adverse WTO report, including: (a) doing nothing; (b) negotiating a resolution between the U.S. and the aggrieved WTO Member or Members; and (c) modifying U.S. law or practice to bring itself into conformity with its WTO obligations as construed by the WTO panel or Appellate Body. 19 U.S.C. §§ 3538(b)(4) (the USTR "*may*, after consulting with the administrative authority and the congressional committees...direct the administering authority to implement, *in whole or in part*....) (emphasis added) and 3533(f)(3) (requiring the USTR to consult with congressional committees "concerning *whether to implement* the report's recommendation and, *if so*, the manner of such implementation and the period of time needed for such implementation.") (emphasis added); DSU, Art. 19, *reprinted in* H.R. Doc. No. 103-316, Vol. 1, at 1666 (1994); *SAA* at 1008-1009. *Supra*, 9 (discussing effect of WTO dispute settlement decisions). Each of these actions would be consistent with the international obligations of the United States, and none of them *necessarily* includes a recalculation of the antidumping duties on the subject entries.

The third assumption (that the change would require different, presumably lower, duty assessments) is premature. Commerce has not adopted any change, or proposed any change. Thus, nothing is

known about the substance or reach of any potential new methodology, should one in fact be adopted. Moreover, in other cases, the application of new methods has not necessarily resulted in lower margins.[14]

B. The Court correctly decided not to interject itself in a process which the statute has assigned to Congress and the Executive Branch

Congress placed the responsibility for the implementation of adverse WTO decisions with the Executive Branch, in particular Commerce, and the United States Trade Representative. Pet. at 16. The courts, meanwhile, must review the agency's decisions under the applicable *U.S. law*, which is the U.S. law that governs at the time the court makes its decision. *See, e.g., Bradley v. School Bd. of Richmond,* 416 U.S. 696, 711-12 (1974); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534 (1991). A choice of law issue *may* arise at such a time when

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[14] When Commerce revised its calculation method as used in an investigation (not an annual review) of imports of softwood lumber, margins increased. Compare *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36067, 36069 (Dep't Comm. May 22, 2002) with *Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products From Canada*, 70 Fed. Reg. 22636, 22645 (Dep't Comm. May 2, 2005).

the law has in fact changed, and a court may *then* be called upon to decide whether its decision is governed by the new law governing at the time of the court's decision or the prior law. *See, e.g., J. B. Beam*, 501 U.S. at 534-35. But here no such choice of law issue arises, because no modification has yet been adopted (and no such modification could be applied to the entries in issue). And, in any event, the temporal reach of any change is expressly addressed in the statute.

Thus, the Appellate Court, recognizing that Commerce's practice was lawful under existing U.S. law, and respecting the statute's detailed instruction regarding the implementation of adverse WTO dispute settlement decisions, correctly declined to remand. Conversely, if the reviewing court had instead set aside Commerce's lawful determination, in the anticipation that U.S. law or Commerce's practice would change, then it would have impermissibly interfered in a task which Congress reserved for itself and the Executive Branch. As reviewed by the Federal Circuit court in a prior appeal:

> Congress has enacted legislation to deal with the conflict presented here. It has authorized the United States Trade Representative, an arm of the Executive branch, in consultation with various congressional and executive bodies and agencies, to determine whether or not to implement WTO reports and determinations, and, if so implemented, the extent of implementation. *See* 19 U.S.C. §§ 3533(f), 3538 (2000); *see also*

> 19 U.S.C. § 3533(g) (2000) (defining a statutory scheme that Commerce must observe in order to change its policy to conform to a WTO ruling).
>
> ***
>
> "The conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government ...." *United States v. Pink*, 315 U.S. 203, 222-23, 62 S.Ct. 552, 86 L.Ed. 796 (1942). In this case, section 1677(35) presented Commerce with a choice as to how it calculates weighted-average dumping margins. We give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination. *See Fed.-Mogul Corp. v. United States*, 63 F.3d 1572, 1582 (Fed. Cir. 1995). *We will not attempt to perform duties that fall within the exclusive province of the political branches, and we therefore refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body unless and until such ruling has been adopted pursuant to the specified statutory scheme.*

Corus, 395 F.3d at 1349 (emphasis added). *See also Corus*, 387 F. Supp.2d at 1300.

CONCLUSION

For all of the reasons stated above, Timken prays that this Honorable Court deny the petition for a *writ of certiorari*.

Respectfully submitted,

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APPENDIX

APPENDIX -- STATUTORY PROVISIONS

19 U.S.C. § 1673. Imposition of antidumping duties

If—

(1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission determines that—

> (A) an industry in the United States-- (i) is materially injured, or (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise. For purposes of this section and section 1673d(b)(1) of this title, a reference to the sale of foreign merchandise includes the entering into of any leasing ar-

rangement regarding the merchandise that is equivalent to the sale of the merchandise.

(June 17, 1930, ch. 497, title VII, Sec. 731, as added Pub. L. 96-39, title I, Sec. 101, July 26, 1979, 93 Stat. 162; amended Pub. L. 98-573, title VI, Sec. 602(b), Oct. 30, 1984, 98 Stat. 3024; Pub. L. 103-465, title II, Sec. 233(a)(1)(A), (2)(A)(i), Dec. 8, 1994, 108 Stat. 4898.)

19 U.S.C. § 1675. Administrative review of determinations

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 \1\ of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net countervailable subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement,

and shall publish in the Federal Register the results of such review, together with notice of

any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

***

(3) Time limits

(A) Preliminary and final determinations

The administering authority shall make a preliminary determination under subparagraph (A), (B), or (C) of paragraph (1) within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review under paragraph (1) is requested, and a final determination under paragraph (1) within 120 days after the date on which the preliminary determination is published. If it is not practicable to complete the review within the foregoing time, the administering authority may extend that 245-day period to 365 days and may extend that 120-day period to 180 days. The administering authority may extend the time for making a final determination without extending the time for making a preliminary determination, if such final determination is made not later than 300 days after the date on which the preliminary determination is published.

(B) Liquidation of entries

If the administering authority orders any liquidation of entries pursuant to a review under paragraph (1), such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

(C) Effect of pending review under section 1516a

In a case in which a final determination under paragraph (1) is under review under section 1516a of this title and a liquidation of entries covered by the determination is enjoined under section 1516a(c)(2) of this title or suspended under section 1516a(g)(5)(C) of this title, the administering authority shall, within 10 days after the final disposition of the review under section 1516a of this title, transmit to the Federal Register for publication the final disposition and issue instructions to the Customs Service with respect to the liquidation of entries pursuant to the review. In such a case, the 90-day period referred to in subparagraph (B) shall begin on the

day on which the administering authority issues such instructions.

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(June 17, 1930, ch. 497, title VII, Sec. 751, as added Pub. L. 96-39, title II, Sec. 101, July 26, 1979, 93 Stat. 175; amended Pub. L. 98-573, title VI, Sec. 611(a)(2), (3), Oct. 30, 1984, 98 Stat. 3031; Pub. L. 99-514, title XVIII, Sec. 1886(a)(8), Oct. 22, 1986, 100 Stat. 2922; Pub. L. 100-418, title I, Sec. 1333(b), Aug. 23, 1988, 102 Stat. 1209; Pub. L. 103-465, title II, Secs. 220(a), 283(c), Dec. 8, 1994, 108 Stat. 4857, 4930; Pub. L. 106-36, title II, Sec. 2410, June 25, 1999, 113 Stat. 171.)

19 U.S.C. § 1677. Definitions; special rules

For purposes of this subtitle—

***

(34) Dumped; dumping

The terms ``dumped" and ``dumping" refer to the sale or likely sale of goods at less than fair value.

(35) Dumping margin; weighted average dumping margin

(A) Dumping margin

The term "dumping margin" means the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.

(B) Weighted average dumping margin

The term ``weighted average dumping margin" is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer.

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(June 17, 1930, ch. 497, title VII, Sec. 771, as added Pub. L. 96-39, title I, Sec. 101, July 26, 1979, 93 Stat. 176; amended Pub. L. 98-573, title VI, Sec. 612(a), Oct. 30, 1984, 98 Stat. 3033; Pub. L. 99-514, title XVIII, Sec. 1886(a)(9), Oct. 22, 1986, 100 Stat. 2922; Pub. L. 100-418, title I, Secs. 1312, 1316(b), 1326(a)-(c), 1327-1330, 1335, Aug. 23, 1988, 102 Stat. 1184, 1187, 1203-1206, 1210; Pub. L. 100-449, title IV, Sec. 403(d), Sept. 28, 1988, 102 Stat. 1887; Pub. L. 100-647, title IX, Sec. 9001(a)(5), Nov. 10, 1988, 102 Stat. 3807; Pub. L. 101-382, title I, Sec. 139(a)(3), title II, Sec. 224(a), (b), Aug. 20, 1990, 104 Stat. 653, 659, 660; Pub. L. 103-182, title IV, Sec. 412(b), title VI, Sec. 637(b), Dec. 8, 1993, 107 Stat. 2146, 2203; Pub. L. 103-465, title II, Secs. 221(b), 222, 229(b), 233(a)(3), (4), (5)(BB)-(FF), (b), 251, 266, 267, 270(c)(2), (e), Dec. 8, 1994, 108 Stat. 4869, 4890, 4898-4902, 4915, 4917, 4918; Pub. L. 104-295, Sec. 20(b)(7), (14), Oct. 11, 1996, 110 Stat. 3527.)

19 U.S.C. § 3512. Relationship of agreements to United States law and State law

(a) Relationship of agreements to United States law

(1) United States law to prevail in conflict

No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed--

(A) to amend or modify any law of the United States, including any law relating to--

(i) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) worker safety, or

(B) to limit any authority conferred under any law of the United States, including section 2411 of this title, unless specifically provided for in this Act.

***

(c) Effect of agreement with respect to private remedies

(1) Limitations

No person other than the United States--

(A) shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or

(B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement.

(2) Intent of Congress

It is the intention of the Congress through paragraph (1) to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements, including by precluding any person other than the United States from bringing any action against any State or political subdivision thereof or raising any defense to the application of State law under or in connection with any of the Uruguay Round Agreements--

(A) on the basis of a judgment obtained by the United States in an action brought under any such agreement; or

(B) on any other basis.

***

(Pub. L. 103-465, title I, Sec. 102, Dec. 8, 1994, 108 Stat. 4815.)

19 U.S.C. § 3533. Dispute settlement panels and procedures

* * *

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed contents of the final rule or other modification; and

(F) the final rule or other modification has been published in the Federal Register.

(2) Effective date of modification

A final rule or other modification to which paragraph (1) applies may not go into effect before the end of the 60-day period beginning on the date on which consultations under paragraph (1)(E) begin, unless the President determines that an earlier effective date is in the national interest.

(3) Vote by congressional committees

During the 60-day period described in paragraph (2), the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate may vote to indicate the agreement or disagreement of the committee with the proposed contents of the final rule or other modification. Any

such vote shall not be binding on the department or agency which is implementing the rule or other modification.

(4) Inapplicability to ITC

This subsection does not apply to any regulation or practice of the International Trade Commission.

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(Pub. L. 103-465, title I, Sec. 123, Dec. 8, 1994, 108 Stat. 4830.)